(1)

Supreme Court, U.S.
FILED

992076 MAY 17 2000

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 2000

Benjamin J. Roscoe and
Geraldine M. Roscoe,
Petitioners,

vs.

Federal Home Loan Mortgage
Association and Bank United of Texas FSB,
Respondents.

Petition for a writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Benjamin J. Roscoe and Geraldine M. Roscoe,
Petitioner, Pro se
5328 Montgomery Blvd. NE
Albuquerque, New Mexico 87109
(505) 881-0662

94 pp

QUESTIONS PRESENTED

I. Where an unambiguous agreement includes recitals, is it reversible error for a district court to grant an opposed motion for summary judgment on grounds of statements contained in the recitals?

II. Where an amendment to a two-party contract is not executed by both parties, does not provide for incurrence of detriment by the promissee, is not executed by both parties, and is not executed for the same purpose as the contract, is it reversible error for the district court to grant an opposed motion for summary judgment to enforce the terms of the amendment?

III. Where plaintiffs are denied discovery from defendants by order of the district court, is it reversible error for the district court to grant an opposed notion for summary judgment to dismiss the complaint?

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner knows of no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

Page

Questions Presented.....i

List of Parties.....ii

Table of Contents.....iii

Table of Citations.....v

Opinions Below.....1

Statement of Jurisdiction 1

Statement of the Case 2

Reasons for Granting the Writ 8

I. Where an unambiguous agreement includes recitals, is it reversible error for a district court to grant an opposed motion for summary judgment on grounds of statements contained in the recitals?.....9

II. Where an amendment to a two-party contract is not executed by both parties, does not provide for incurrence of detriment by the promissee, is not executed by both parties, and is not executed for the same purpose as the contract, is it reversible error for the district court to grant an opposed motion for summary judgment to enforce the terms of the amendment?.....13

III. Where plaintiffs are denied discovery from defendants by order of the district court, is it reversible error for the district court to grant an opposed notion for summary judgment to dismiss the complaint?.....18

Conclusions 20

TABLE OF CITATIONS

Citations:

Scott v. McCreary, 148 Ky. 791, 147 S.W. C.A.D.C.,1995. 283 Ky. 628 JONES v. CITY OF PADUCAH et al. Court of Appeals of Kentucky. June 28, 1940. Appeal from Circuit Court, McCracken County; Joe L. Price, Judge.....9

Zaklama v. Mount Sinai Medical Ctr., 906 F.2d 650, 652 (11th Cir.1990).....11

S.C. Loveland, Inc. v. East West Towing, Inc., 608 > [10][11] 11

Johnson v. Johnson, 725 So.2d 1209, 1212 (Fla.Dist.Ct.App.1999).....11

Hubbard v. Albuquerque Truck Ctr. Ltd., 1998-NMCA-058, 125 N.M. 153, 958 P.2d 111 (Ct. App. 1998 .....13, 17

Owen v. Butn Const. Co., 90 N.M. 297, 563 P.2d 91, (1997) 13, 17

Yankee Atomic Elec. Co. v. New Mexico and Arizona Land Co.. 632 F.2d 855 (10th Cir. 1980).....13, 17

Ruffin v, Mercury Record Productions, 513 F.2d 222 (6th Cir.1975), cert. denied; 17

Alaska Packers' Assn. v. Domenico, 11 Fed. 99 (C.C.A. 9, 1902) 17

Continental Gas. Co. v. Wilon-Avery, 115 Ga.App. 793 156 S.E.2d 152 (1967) 17

Insurance Agents v. Abel, 338 N.W.2d 531 (Iowa App. 1983).....17

Healy, v. Brewster, 59 Cal.2d 455, 30 Cal. Rptr. 129, 380 P.2d 817 (1963).....17

Rudio v. Yellowstone Merch. Corp., 200 Mont. 537, 652 P.2d 1163 (1982). 17

P.2d 111 (Ct. App. 1998) 13, 17

Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977) 19

753 F.2d 1528, certiorari denied > 106 S.Ct. 85, 474 U.S. 826, 88 L.Ed.2d 70. 19

Cedillo v. International Ass'n of Bridge & Structural Iron Workers, Local Union No. 1, C.A.7 (Ill.) 1979, > 603 F.2d 7. 686 P.2d 575) 19

C.L. 775, 1030 9

17 C J S., Contracts, S 314. 9

15 O.S.1951 SS 114, 115. 11

15 Mercer L.Rev 506 (1964) 17

> 307Ak156 k. Objections and waiver thereof. N.M., 1982. > 83k62.2 k. Gas.....19

> 95k160 k. Recitals. C.A.D.C.,1995.> 361k210 k. Preamble and recitals. C.A.10, 1973. 10

> 157k318(1) k. in general. C.A.10 1953. 10

> 252k40.1 k. in general. C.A.11 (Fla.),1999: 11

> 95k160 k. Recitals. C.A.11 (Fla.),1999. 11

> 95k160 k. Recitals. C.A.7 (Ill.),1996. 12

> 95k147(1) k. in general. C.A.10 1949. 12

> 95k164 k. Construing instruments together. N.M.App.,1997 14

> 95k164 k. Construing instruments together. N.M.,1995 14

> 95k164 k. Construing instruments together. N.M.,1995 14

> 95k164 k. Construing instruments together. N.M.App.,1980. 15

> 95k164 k. Construing instruments together. Wyo.,1984. 15

> 95k166 k. Matters annexed or referred to as part of contract. C.A.7 (Ill.),1996. 16

Other Authorities :

Black's Law Dictionary 6, 9

Webster's New International Dictionary 9

Publication Words and Phrases 10

Pre-existing Duty Rule: Modification in a Two Party Case, 124 N.M. 613, *616, 954 P.2d 45, **48.....16

Corbin, Does a Pre-existing Duty Defeat Consideration, 27 Yale L.J. 362 (1918); Havighunt, Consideration, Ethics and Administration, 42 Colum.L.Rev. 1 (1942); Hillman, Contract Modification in Iowa, 65 Iowa L.Rev. 343 (1980). 17

Rules Civ.Proc., Rules 26, 26(B)(1). (Cite as:.....19

PETITION FOR A WRIT OF CERTIORARI

COMES NOW BENJAMIN J. ROSCOE and GERALDINE M. ROSCOE, Petitioners, Pro se, and petition the Court for a WRIT OF CERTIORARI to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit on a petition for rehearing was entered on June 8, 1994. It is attached hereto in the Appendix. The opinion of the Court of Appeals for the Tenth Circuit on the appeal from the District Court of New Mexico was entered on May 5, 1994. It is attached hereto in the Appendix. The opinion of the District Court of New Mexico was entered on December 2, 1993. It is attached hereto in the Appendix.

STATEMENT OF JURISDICTION

The basis for jurisdiction in this Court is the Tenth Circuit Court of Appeals entry of a decision which is in conflict with the decision of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

The judgment of the Tenth Circuit sought to be reviewed is Tenth Circuit Case No. 99-2234 entered on December 10, 1999, a copy is attached hereto, and denial of petition for review entered on January 6,

2000, a copy is attached hereto, and denials of Motion for Clarification entered on January 25 and January 26, 2000, copies are attached hereto.

This petition may be filed by May 20, 2000. See Appendix G.

STATEMENT OF THE CASE

Plaintiffs/Appellants, hereinafter referred to as Plaintiffs borrowed $2,325,000.00 from Defendant/Appellee Bank United of Texas hereinafter referred to as Bank United. The loan was secured by a note and mortgage on Plaintiffs' multifamily apartment buildings. The contract covering the loan transaction is embodied in the terms set forth in a five page document called the Loan Agreement. See, Loan Contract Agreement, Appendix A hereto.

The Loan Agreement contract embodies the entire agreement between the parties, supersedes all prior agreements and understandings, and may be amended only by an instrument in writing executed by the parties. See para 5.(c). of Loan Agreement.

The Loan Agreement was never amended by the parties.

There are clauses in the Loan Agreement document which begin with the word, "whereas." Plaintiffs contend that such clauses are but introductory or prefatory statements meaning

"considering that" or "that being the case", and are not an essential part of the operating portions of the contract.

Plaintiffs executed a Multifamily Note (See Appendix B hereto) and a Multifamily Mortgage to Bank United's benefit which evidences the debt and secures the debt with Plaintiffs' real property. The multifamily Note and Mortgage were subsequently assigned to Defendant Freddie Mac. Bank United continued to service the loan following that assignment.

The activities of Freddie Mac are relevant to the issues of the Complaint but are not relevant to the issues of this appeal.

Plaintiffs paid off the balance of the loan to Bank United before the remaining balance was due.

Bank United required Plaintiffs to pay them a "prepayment premium" in the amount of $394,684.39 in addition to the payment of the balance of the loan. Plaintiffs paid the prepayment premium to Bank United.

Bank United required Plaintiffs to pay the prepayment premium based upon terms set forth in a rider to the loan note which rider Bank United claimed to be part of the Loan Agreement contract.

The rider to the note is a document called Rider to the Multifamily Note. See Appendix C hereto. The Rider to

the Multifamily Note is by its terms an amendment and will be hereinafter referred to as the Rider Amendment. Plaintiffs contend the Rider Amendment was never duly incorporated into the Loan Agreement contract.

The underlying action is a suit by Plaintiffs to recover the prepayment premium payment and to seek damages from Freddie Mac for its interference with Plaintiffs' Loan Agreement contract with Bank United.

Bank United executed the Loan Agreement contract at a time different from when Plaintiffs executed the contract. Bank United did not execute the Rider Amendment.

The purpose of the Loan Agreement contract is for Bank United to undertake the detriment of giving funds to Plaintiffs and for Plaintiffs to undertake the detriment of taking on indebtedness in favor of Bank United. The purpose of the Rider Amendment is for Plaintiffs to undertake additional detriment of paying Bank United a non-predetermined amount of money in the event that Plaintiffs pay off the indebtedness before a non-predetermined period of time without any additional detriment taken on by Bank United. The purposes of the two instruments, the Loan Agreement contract and the Rider Amendment are not the same.

In the suit below Plaintiffs make eight claims against Defendants which are set forth in their Complaint. However the questions presented for review to this Court address only reversible errors of the lower court and affirmation by the Tenth Circuit and do not address the details of all Plaintiffs' claims.

Plaintiff's filed the Complaint in State District Court for money wrongfully extracted. Freddie Mac removed the action to the Federal District Court.

The crux of Plaintiffs' claims is that the only contract entered into between Plaintiffs and Bank United is the Loan Agreement contract and that that contract does not bind Plaintiffs to the terms of the Rider amendment.

Shortly after the case was removed Defendants took Plaintiffs' depositions.

After Defendants took Plaintiffs' deposition and before Plaintiffs had an opportunity to make discovery from Defendants, the Federal District Court entered an order, sua sponte, unconditionally, that no formal discovery be made in the action. The order entirely prohibited Plaintiffs from making any discovery on Defendants. The order was undisturbed for the balance of the action in the lower court.

Bank United filed a motion for summary judgment in its favor against all Plaintiffs, claims.

In their motion for summary judgment Defendants aver the contract terms are clear and no ambiguity of the contract is alleged by the movants.

In their Response to the motion for summary judgment Plaintiffs arguably showed that genuine issues of material facts remained and alerted and advised the lower court that they had not had an opportunity to make discovery.

The lower court granted the motion for summary judgment and dismissed all Plaintiffs' claims. In its decision to grant summary judgment, the lower court relied upon Bank United's exhibits and discovery obtained from depositions given by Plaintiffs.

The basis upon which the lower court granted summary judgment is its construance of the following clause in the Loan Agreement,(See appendix A, para. 4)"certain loan documents including, without limitation, a Multifamily Note with attachments (the "Note") and a Multifamily Mortgage, Assignment of Rents and Security agreement with attachments (the "Mortgage") (the Note, the Mortgage, and all other documents evidencing, securing and relating to the Note are collectively referred to herein as the "Loan Documents")."

Notwithstanding that the term "loan documents" set forth in the above clause of the Loan Agreement does not denominate, include, nor specify the document denominated Rider to the Multifamily Note nor any of its terms, the lower court construed this clause of the Loan Agreement to be a binding agreement by Plaintiffs to pay the prepayment premium.

Moreover and more importantly the clause is preceded by the word, "Whereas" in the Loan Agreement. See Loan Agreement, first page.

Inasmuch as the clause is preceded by the word, whereas, it is a recital as defined in Black's Law

Dictionary, i.e., Recital.-- The formal statement or setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded. The recitals are situated in the premises of a deed, that is, in that part of a deed between the date and the habendum, and they usually commence with the formal word "whereas-" In pleading, the statement of matter as introductory to some positive allegation, beginning in declarations with the words, "For that whereas."

Plaintiffs contend that the Rider Amendment by its terms is an amendment to the Note. See Rider to the Multifamily Note, first line. The parties never entered into a written agreement to amend the Note as is required in the Loan Agreement contract. See Loan Agreement para.5.c.

Notwithstanding the plain language of the Rider Amendment that the Rider Amendment is an amendment to a contract and that the Rider amendment is not executed by the parties, the lower court construed the Rider amendment as an operating portion of the Loan Agreement.

The lower court was advised of and alerted to the fact that Plaintiffs were unable to present facts obtained from discovery to oppose the motion for summary judgement. The lower court nevertheless allowed its unilateral prohibition of discovery to remain in effect.

Plaintiffs appealed the lower court's decision to the Tenth Circuit.

The Tenth Circuit affirmed the lower court.

The Tenth Circuit construed the recitals in the Loan Agreement contract as essential parts of the operating portions of that contract.

The Tenth Circuit construed the Rider Amendment as operating portions of the Loan Agreement contract.

The Tenth Circuit joined the lower court to sustain and legitimize the discovery prohibition against Plaintiffs.

REASONS FOR GRANTING THE WRIT

I. It is necessary, in the interest of application of substantive law to summary judgment in a case involving a contract dispute, to not rely on recitals to a contract where the contract terms are clear and no ambiguity of the contract is alleged by the movant. In the Tenth Circuit review of this case the standard of review is review de novo and is review of application of substantive law. The Tenth Circuit Panel did not review application of substantive law. Consequently their product, affirmation, is substandard product. It should not knowingly be left to stand as a product of the Tenth Circuit.

II. The Supreme Court should not allow the lower courts to indirectly enforce terms of a unilaterally executed amendment to a contract, which amendment has different purpose than the contract,

where such enforcement is realized as a consequence of the court's granting summary judgment to dismiss a complaint.

III. The Supreme Court should correct that conduct of the lower courts whereby the courts will grant an opposed motion for summary judgment to dismiss a complaint after denying a plaintiff an opportunity to make discovery.

I. WHERE AN UNAMBIGUOUS AGREEMENT INCLUDES RECITALS, IS IT REVERSIBLE ERROR FOR A DISTRICT COURT TO GRANT AN OPPOSED MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF STATEMENTS CONTAINED IN THE RECITALS?

Like the preamble of a legislative measure, a "Whereas" clause of a contract is but an introductory or prefatory statement meaning "considering that" or "that being the case." See Webster's New International Dictionary.

The clause helps to explain the reasons inducing the execution of the contract and perhaps describes its purposes or objects. The recital may be resorted to as an aid in construction or interpretation, but it is not an essential part of the operative portions of the contract. 17 C.J.S., Contracts, S 314. See 25 R.C.L. 775, 1030; > Scott v. McCreary, 148 Ky. 791, 147 S.W. > 83k62.2 k. Gas. C.A.D.C.,1995. See also Black's Law Dictionary which gives the legal definition of whereas and cites 283 Ky. 628 JONES v. CITY OF PADUCAH et al. Court of Appeals of Kentucky. June

28, 1940. Appeal from Circuit Court, McCracken County; Joe L. Price, Judge.

Also see publication Words and Phrases for other judicial definitions.

Abundant case law is clear on the whereas recital and it is that the recital cannot create any right beyond those arising from operative terms of document. > 95k160 k. Recitals. C.A.D.C.,1995. Whereas clause of contract, while sometimes useful as aid to interpretation, cannot create any right beyond those arising from operative terms of document.

In the present case Defendants strictly assert that the contract in this case needs no court-interpretation of intent of the parties. Their motion for summary judgment could not have been granted absent the fact that no court-interpretation of intent of the parties is needed.

The Tenth Circuit Panel in this case, by construing the whereas clause as binding provision [page 2] rather than dismissing the whereas clause in their analysis, Page 14 of the OPINION AND JUDGMENT at line 5. acted contrary to Tenth Circuit precedence. See > 361k210 k. Preamble and recitals. C.A.10, 1973. Section of Utah long-arm statute reciting legislative intent and declaring as its purpose to protect its citizens with effective means of redress against nonresident persons is prefatory language which is neither essential nor controlling in construction of Act where the operative sections are clear. And see >157k318(1) k. In general. C.A.10 1953. Under

Oklahoma law, recitals of consideration in deeds of conveyance are presumptive evidence as between parties, but are purely hearsay between parties claiming under deeds or instruments of conveyances and strangers to title. 15 O.S.1951 SS 114, 115.

Florida case law, to cite another jurisdiction, is clear on the essential non-binding nature of the recital. As in > 252k4O.1 k. In general. C.A.11 (Fla.),1999: As interpreted under Florida law, "whereas" clause in joint venture agreement, which stated that parties recognized and confirmed that one joint venturer was sole owner of vessel and that no party had claim against vessel, did not constitute waiver of co-venturer's maritime lien against vessel for debt incurred in converting vessel pursuant to prior joint venture agreement that was negotiated, but never executed; "whereas" clause was not binding. Also as in > 95k160 k. Recitals. C.A.11 (Fla.),1999. Under Florida law, "whereas" or other prefatory clauses are not binding. "We review the lower court's decision de novo. See > Zaklama v. Mount Sinai Medical Ctr., 906 F.2d 650, 652 (11th Cir.1990). When interpreting a maritime contract, we apply Florida law pursuant to the conflicts of law principle of lex loci contractus-the law of the place where the contract is made. Cf. > S.C. Loveland, Inc. v. East West Towing, Inc., 608 > [10][11] Furthermore, Hanson's reliance on the "whereas" clause is misplaced for two reasons: First, under Florida law, such "whereas" or other prefatory clauses are not binding. > Johnson v. Johnson, 725 So.2d 1209, 1212 (Fla.Dist.Ct.App.1999) ("[W]e do not agree that the prefatory recitations contained in the various 'whereas' clauses are binding, operative provisions to this otherwise unambiguous contract.")

The plain language of the operative portion of the Loan Agreement those provisions following the recital whereas clauses, does not refer to the recitals. Therefore the whereas clauses are not binding obligations. See > 95k160 k. Recitals. C.A.7 (I11.),1996. Under Illinois law, introductory language or recitals in instrument are not binding obligations unless so referred to in operative portion of instrument as to show design that they should form part of it.

The essential parts of the operative portions of the Loan agreement are set forth following the whereas clauses. The operative portions of the Loan Agreement do not provide for the Rider amendment. The whereas clause which the Tenth Circuit Panel misconstrues as binding [Page 2 of the opinion] does not constitute -a bargained-for detriment on the parties. See > 95k147(1) k. In general. C.A.10 1949. Purpose of a written contract is to evidence terms upon which minds of parties meet and unite at time they enter into it, and where its terms are plain there is no room for construction, but where meaning of a contract is doubtful, function of judicial interpretation is to ascertain mutual intention of parties, and when that is found, it prevails over verbal inaccuracies, careless recitals, inapt expressions or dry words of stipulation.

Inasmuch as the only contract entered into by the parties is the Loan agreement contract, which embodies the entire agreement between the parties, supersedes all prior agreements and understandings and does not include the Rider, the court should only enforce the Loan Agreement contract and must not

constructively amend the Loan Agreement contract by enforcing the Rider. See Hubbard v. Albuquerque Truck Ctr. Ltd., 1998-NMCA-058, 125 N.M. 153, 958 P.2d 111 (Ct. App. 1998) it is not the province of the courts to alter or amend a contract freely entered into by the parties, Owen v. Butn Const. Co., 90 N.M. 297, 563 P.2d 91, (1997), and the courts cannot modify or change the language of a contract for the benefit of one party and to the detriment of another. See Yankee Atomic Elec. Co. v. New Mexico and Arizona Land Co.. 632 F.2d 855 (10th Cir. 1980).

WHEREFORE Plaintiffs/Appellants pray the Court remand this case with instructions to vacate the order granting summary judgments to Defendants/Appellees and to put the case on a track for a hearing on the merits.

II. WHERE AN AMENDMENT TO A TWO-PARTY CONTRACT IS NOT EXECUTED BY BOTH PARTIES, DOES NOT PROVIDE FOR INCURRENCE OF DETRIMENT BY THE PROMISSEE, IS NOT EXECUTED BY BOTH PARTIES, AND IS NOT EXECUTED FOR THE SAME PURPOSE AS THE CONTRACT, IS IT REVERSIBLE ERROR FOR THE DISTRICT COURT TO GRANT AN OPPOSED MOTION FOR SUMMARY JUDGMENT TO ENFORCE THE TERMS OF THE AMENDMENT?

The parties did not execute the Loan Agreement contract at the same time. Bank United never executed the Rider amendment. The instruments, the Loan Agreement contract and the Rider amendment, are not executed by the parties.

The purposes of the two instruments are not the same.

As previously stated herein Defendants strictly assert that the contract in this case needs no court-interpretation of intent of the parties.

Therefore the two instruments, the Contract and the Rider are not construed as one agreement. See > 95k164 k. Construing instruments together. N.M.App.,1997 Generally, absent evidence indicating contrary intention, instruments executed at same time by same parties for same purpose and in course of same transaction are, in law's eye, one instrument, and would be read and construed together. And see > 95k164 k. Construing instruments together. N.M., 1995. If two or more writings are a part of single transaction and concern same subject matter, they are single contract.

Clearly the Loan Agreement contract and the Rider amendment are multiple documents.

The courts should not determine that they consist of a single document without considering intentions of parties and surrounding circumstances. See 95k164 k. Construing instruments together. N.M., 1995 Whether multiple documents consist of single contract is determined by considering intentions of parties and surrounding circumstances. But if the Tenth Circuit Panel determines it needs to take up the intentions of parties and surrounding circumstances then the Appellees' motion for summary judgment must be denied as a matter of law.

It should be noted that Bank United did not execute the Rider. See 95k164 k. Construing instruments together. N.M. App, 1980. When two documents are executed by the same parties and concern part of the same subject matter, though not involving the same transaction, issue of whether they should be treated as single contract is determined by considering the intent of the parties manifested at the time of contracting and viewed in light of the surrounding circumstances.

The plain language of the Rider amendment is that it is an amendment to an instrument. Clearly the Rider amendment taken by itself is not a contract. Among other things the Rider amendment does not set forth any detriment taken on by Bank United for the benefit provided to Bank United and Bank United never executed the Rider Document.

Therefore the two instruments, the Contract and the Rider are not construed as one agreement. See > 95k164 k. Construing instruments together Wyo., 1984. Two contracts must be construed as one agreement where "whereas" clause of amended contract incorporated original contract by reference. (Cite as: 686 P.2d 575)

Within the four corners of the Loan Agreement are set forth, as operative terms of that document, a provision that the Contract is complete and the contract cannot be amended. The Tenth Circuit Panel's reliance on the allegedly incorporated Rider amendment to conclude that the contract is not complete unless the

Rider Amendment is annexed by reference is unlawful. See > 95k166 k. Matters annexed or referred to as part of contract. C.A.7 (I11.), 1996. Under Illinois law, when determining whether document is incorporated into contract, court limits its inquiry to four corners of contract; it cannot rely on the alleged incorporated document to conclude that otherwise complete agreement is inadequate.

By its terms, the Rider amendment is an amendment to the Note. An amendment to a note is a modification of a note. Even if the Note were a contract, the Rider Amendment to the Note is not enforceable because Bank United has not incurred a detriment for the modification of the Note. In the modification of the Note Bank United is merely performing existing duties, giving the loan funds to Plaintiffs, it incurred by virtue of the Loan Agreement and the Note. Bank United is not taking on any detriment by virtue of the modification. The Rider is an attempted modification without consideration. The argument that a contract was formed when the Rider was executed must fail for lack of consideration because Bank United was already bound to perform by virtue of the Loan Agreement contract and the Note. Because of this pre-existing duty on Bank United there was inadequate consideration to form a contract by the Rider modification. See The Pre-existing Duty Rule: Modification in a Two Party Case, 124 N.M. 613, *616, 954 P.2d 45, **48. Under the pre-existing duty rule, where a party does or promises to do what he is legally obligated to do or promises to refrain from doing or refrain from doing what he is not legally privileged to do he has not incurred detriment. It is clear that if a party does only what he is legally obligated to do or less he is not suffering legal detriment because he is

not surrendering privilege. Also see >Ruffin v, Mercury Record Productions, 513 F.2d 222 (6th Cir.1975), cert. denied; > Alaska Packers' Assn. v. Domenico, 11 Fed. 99 (C.C.A. 9, 1902); Continental Gas. Co. v. Wilon-Avery,, 115 Ga.App. 793 156 S.E.2d 152 (1967); see 15 Mercer L.Rev 506 (1964); > Insurance Agents v. Abel, 338 N.W.2d 531 (Iowa App. 1983); Healy, v. Brewster, 59 Cal.2d 455, 30 Cal. Rptr. 129, 380 P.2d 817 (1963); Rudio v. Yellowstone Merch. Corp., 200 Mont. 537, 652 P.2d 1163 (1982). See > Corbin, Does a Pre-existing Duty Defeat Consideration, 27 Yale L.J. 362 (1918); Havighunt, Consideration, Ethics And Administration, 42 Colum.L.Rev. 1 (1942); Hillman, Contract Modification in Iowa, 65 Iowa L.Rev. 343 (1980).

Inasmuch as the only contract entered into by the parties is the Loan Agreement contract, which embodies the entire agreement between the parties, supersedes all prior agreements and understandings and the Loan Agreement contract by its terms can be amended only by an instrument in writing executed by all of the parties thereto and the Plaintiffs and Bank United never entered into a written agreement to amend the Loan Agreement to add the Rider, the Court must enforce the Loan Agreement contract and must not amend the Loan Agreement contract by enforcing the Rider. See > Hubbard v. Albuquerque Truck Ctr. Ltd., 1998-NMCA-058, 125 N.M. 153, 958 P.2d 111 (Ct. App. 1998) it is not the province of the courts to alter or amend a contract freely entered into by the parties, Owen v. Butn Const. Co., 90 N.M. 297, 563 P.2d 91, (1997), and the courts cannot modify or change the language of a contract for the benefit of one party and to the detriment of another. See Yankee

Atomic Elec. Go. v. New Mexico and Arizona Land Co.. 632 F.2d 855 (10th Cir. 1980).

WHEREFORE Plaintiffs pray the Court remand this case with instructions to vacate the order granting summary judgments to Defendants/Appellees and to put the case on a track for a hearing on the merits.

III. WHERE PLAINTIFFS ARE DENIED DISCOVERY FROM DEFENDANTS BY ORDER OF THE DISTRICT COURT, IS IT REVERSIBLE ERROR FOR THE DISTRICT COURT TO GRANT AN OPPOSED NOTION FOR SUMMARY JUDGMENT TO DISMISS THE COMPLAINT?

By order of the lower court Plaintiffs never had an opportunity to make discovery from Defendants.

The Tenth Circuit Panel condoned and justified the lower court's discovery prohibition against Plaintiffs by saying if Roscoe's needed additional discovery their proper recourse was to file a motion pursuant to FRCP 56(f). In the first place FRCP 56(f) does not set forth a procedure to file a motion. Secondly it is not a question of needing additional discovery because in fact Roscoe's were unilaterally banned from making any discovery at all.

The lower court was advised of and alerted to the fact that Plaintiffs were unable to present facts obtained from discovery to oppose the motion for summary judgement. The lower court nevertheless allowed the

prohibition of discovery to remain in effect, and, having this knowledge granted the motion for summary judgment.

The order prohibiting formal discovery prejudicially affected Plaintiffs' case and is a clear violation of Plaintiffs' basic fundamental rights. See: Right to examine defendant as to all issues in pleadings. As to all issues made by the pleadings in the case, plaintiff had the right to examine defendant fully and exhaustively; such a right is basically fundamental to our system of jurisprudence, and no court has power to restrict or limit it. Griego v. Grieco, 90 N.M. 174, 561 P.2d 36 (Ct. App. 1977). And see > 307Ak156 k. Objections and waiver thereof. N.M., 1982. Notwithstanding objection to deposition, presumption is in favor of discovery, as plaintiff has right to examine defendant fully and exhaustively. Rules Civ.Proc., Rules 26, 26(B)(1). (Cite as: 98 N.M. 394, 649 P.2d 462).

Before summary judgment may be entered, all parties must be given notice of motion and opportunity to respond, which includes time for discovery necessary to develop facts justifying opposition to motion. Grove v. Mead School Dist. No. 354, C.A.9 (Wash.) 1985, > 753 F.2d 1528, certiorari denied > 106 S.Ct. 85, 474 U.S. 826, 88 L.Ed.2d 70.

Where the need for discovery in order to obtain requisite statistical data to substantiate an asserted claim is clear and where plaintiff is effectively denied the opportunity to engage in that discovery, entry of summary judgment for defendant is inappropriate. Cedillo v. International Ass'n of Bridge & Structural

Iron Workers, Local Union No. 1, C.A.7 (Ill.) 1979, > 603 F.2d 7.

WHEREFORE Plaintiffs/Appellants pray the Court remand this case with instructions to vacate the order granting summary judgments to Defendants and to put the case on a track for a hearing on the merits.

CONCLUSIONS

I. Although recitals to a contract may be considered by a court to determine the intentions of the parties where the contract is ambiguous, recitals may not be considered as operating parts of a contract to decide a motion for summary judgment because a prerequisite to the granting of summary judgment is that contract be unambiguous. Accordingly, it is reversible error for any court to grant summary judgment in a contract dispute on the basis of recitals in the contract. In this case the district court granted summary judgment on the basis of recitals to the contract thereby making a reversible error and the Tenth Circuit affirmed the lower court.

II. The pre-existing Duty Rule application to the Rider Amendment renders the Rider Amendment unenforceable. It is clear that if a party does only what he is legally obligated to do or less he is not suffering legal detriment because he is not surrendering privilege. Inasmuch as the only contract entered into by the parties is the Loan Agreement contract, which embodies the entire agreement between the parties, supersedes all prior agreements and understandings and the Loan Agreement contract by its terms can be

amended only by an instrument in writing executed by all of the parties thereto and the Plaintiffs and Bank United never entered into a written agreement to amend the Loan Agreement so as to add the Rider Amendment to the contract, the Court must enforce the Loan Agreement contract and must not amend the Loan Agreement contract by enforcing the Rider Amendment.

III. The lower court granted a motion for summary judgment to dismiss a complaint after denying a plaintiff an opportunity to make discovery. The lower court thereby violated Plaintiffs rights.

WHEREFORE Plaintiffs pray the Court remand this case with instructions to vacate the order granting summary judgments to defendants/Appellees and to put the case on a track for a hearing on the merits.

WHEREFORE Plaintiffs pray the Court remand this case with instructions to vacate the order granting summary judgments to defendants/Appellees and to put the case on a track for a hearing on the merits.

Respectfully submitted,

_____

GERALDINE M. ROSCOE, PRO SE

BENJAMIN J. ROSCOE, PRO SE
5328 MONTGOMERY BLVD. NE
ALBUQUERQUE, NEW MEXICO
87109
TELEPHONE (505) 881-0662

No.

In The

Supreme Court of the United States

OCTOBER TERM, 2000

Benjamin J. Roscoe and
Geraldine M. Roscoe,

Petitioners,

vs.

Federal Home Loan Mortgage
Association and Bank United of Texas FSB,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

APPENDIX

Appendix A - Tenth Circuit Order And Judgment On The Appeal Form The District Court 12/10/93.....1a-27a

Appendix B - Tenth Circuit Order Denying Petition For Rehearing 1/6/00.....1b-2b

Appendix C - The District Court's Memorandum Opinion And Order On Defendants' Motion For Summary Judgment 6/26/99.....1c-14c

Appendix D - Justice Breger's Extention Of The Time To File Petition 2/17/00.....1d-2d

Appendix E-Loan Agreement Contract.....1e-6e

Appendix F-Multifamily Note.....1f-f4

Appendix G-Rider Amendment.....1g-7g

APPENDIX A - TENTH CIRCUIT ORDER AND JUDGMENT ON THE APPEAL FROM THE DISTRICT COURT 12/10/93

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BENJAMIN J. ROSCOE; GERALDINE M. ROSCOE,

Plaintiffs-Appellants,

v. No. 99-2234

FEDERAL HOME LOAN MORTGAGE ASSOCIATION; (D.C. No. CIV-98-1500-BB/LFG)
BANK UNITED OF TEXAS FSB,

(D.N.M.)
Defendants-Appellees.

ORDER AND JUDGMENT(*)

Before **ANDERSON, KELLY** and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R.34.1(G). The case is therefore ordered submitted without oral argument.

Pro se plaintiffs Benjamin J. Roscoe and Geraldine M. Roscoe ("the Roscoes") sued the defendants, Federal Home Mortgage Association ("Freddie Mac") and Bank United of Texas, FSB ("Bank United"), in New Mexico state court. The crux of the Roscoe's' complaint was that the defendants unlawfully "extracted" a financial premium when the Roscoe's prepaid a loan. After the defendants removed the case to federal court, the district court denied the Roscoe's' motion for a default judgment and granted the defendants' motion for judgment as a matter of law. We affirm.

I.

This litigation stems from a "Loan Agreement" ("Agreement") signed by the Roscoe's and Bank United on June 28, 1994. Through the Agreement, the Roscoes obtained a 20-year loan from Bank United in the amount of $2,325,000. The purpose of the loan was to refinance apartment property owned by the Roscoes in Albuquerque, New Mexico ("apartment property"). The apartment complex on this property contains more than 100 units. The Agreement contained the following provision:

WHEREAS, [the Roscoes] shall of even date herewith execute and deliver to [Bank United] certain loan documents including, without limitation, a Multifamily Note with attachments . . . and a Multifamily

Mortgage, Assignment of Rents and Security Agreement with attachments . . . (the Note, the Mortgage, and all other documents evidencing, securing, and relating to the Note are collectively referred to herein as the "Loan Documents") . . . .

Record on Appeal ("ROA"), Doc. 23, Exh. 4, at 1. The parties acknowledged in the Agreement that Freddie Mac would "purchase the [l]oan and take an assignment of the Loan Documents in accordance with the Freddie Mac Multifamily Guide and the terms of Freddie Mac's commitment letter dated May 31, 1994 . . . ." Id.(1)

In compliance with the terms of the Agreement, the Roscoes executed a Multifamily Note ("Note"). The Note incorporated by reference a "Rider to Multifamily Note (Prepayment Premium\Yield Maintenance)" ("Rider"). Id., Exh. 6, at 2. This Rider explained that a "prepayment premium" would be calculated and assessed if the Roscoes prepaid the loan. The Roscoes signed the Rider and agreed to waive "any right to prepay the [l]oan in whole or in part prior to the maturity date of the Note, except as expressly provided" in the Rider. Id., Exh. 7, at 1-3. The Roscoes also acknowledged in the Rider that "in the event of any such prepayment," Bank United shall be entitled to damages for the detriment caused thereby, but . . . it is extremely difficult and impractical to ascertain the extent of such damages. Borrower [i.e., the Roscoes] therefore acknowledges and agrees that the prepayment premiums set forth in this Rider represent reasonable estimates of such damages to [Bank United], which sum Borrower agrees to pay upon demand. Borrower acknowledges that the

prepayment premium provisions of this Rider are a material part of the consideration for the [l]oan. Id. at 3.

In 1996, the Roscoes decided to refinance the apartment property again. To obtain another loan from a different lender, the Roscoes made a business decision to prepay the Bank United loan. Id., Exh. 1, at 87-89. Before they made the prepayment, the Roscoes received a "payoff quote" from Bank United indicating that the premium (or "prepayment penalty") would be $394,684.39. Id., Exh. 9. The Roscoes paid the premium but still received over $1,000,000 in cash from the new loan proceeds after payment of the Bank United loan. Id., Exh. 1, at 119-20; Exh. 10.

The Roscoes filed suit against Bank United and Freddie Mac in 1998. Seeking a refund of the prepayment premium plus interest and damages, the Roscoes attempted to assert eight claims. The Roscoes alleged in their state court complaint that (1) the Rider was an impermissible and unenforceable "amendment" to the Agreement; (2) Freddie Mac was unjustly enriched by its receipt of the prepayment premium; (3) their promise to pay the prepayment premium lacked consideration; (4) the terms of the Rider were vague, ambiguous, and contrary to state law; (5) the Rider was an "illegal promise" because "[t]he formula for determining the prepayment premium" revolved around "outcomes of events which depend on chance;" (6) the amount of the prepayment premium was unconscionable and in violation of the implied covenant of good faith and fair dealing; (7) Bank United's use of the Rider constituted "consumer fraud" and a "deceptive business practice" under New

Mexico's Unfair Practices Act; and (8) Freddie Mac tortuously interfered with the Roscoes' Agreement by inducing Bank United to breach the contract. Id., Doc. 1, Exh. A, at 1-9.

Freddie Mac removed the case to federal court pursuant to 12 U.S.C. § 1452(f).(2) Id., Doc. 1, at 1-2. Shortly thereafter, the Roscoes filed a motion for default judgment. The Roscoes asserted in the motion that Bank United and Freddie Mac were served with process on November 12, 1998, but failed to respond to the complaint within 30 days. Id., Doc. 6, at 1. The district court denied the motion, holding that (1) the 30-day time period did not begin on November 12, 1998 because the Roscoes did not receive an "acknowledgment of service" from the defendants as required by New Mexico Rule of Civil Procedure 1-004(E);(3) and (2) the defendants answered the complaint even though the service effected by the Roscoes was inadequate, thus rendering the answers timely. Id., Doc. 30, at 1-2. The Roscoes then moved for reconsideration or permission to file an interlocutory appeal. Id., Docs. 41-42. The Roscoes later withdrew this motion, stating that upon reflection they believed the order denying their request for a default judgment "[wa]s well within the Court's discretion and [wa]s correct and just." Id., Doc. 43, at 1.

In the meantime, Bank United filed a motion for summary judgment. Id., Docs. 22-23. Freddie Mac adopted Bank United's motion in toto, adding a single undisputed fact: Before the Roscoes obtained the Bank United loan, they prepaid a prior loan on the apartment property and, as a consequence, paid a

separate prepayment premium to Freddie Mac. Id., Docs. 36, 40; Doc. 44, at 2. The district court granted the defendants' motions, concluding that (1) the Agreement, including the attached Rider, was a valid contract, id., Doc. 49, at 5-6; (2) the Rider was incorporated by reference and therefore was not an "amendment" to the contract, id. at 7; (3) the prepayment provision of the

Agreement was enforceable under New Mexico law, id. at 7-8; and (4) the amount of the prepayment premium was not unconscionable, tantamount to "unjust enrichment," or otherwise illegal. Id. at 9-10. Even though the defendants did not specifically address the Unfair Practices Act in their motions, the district court entered summary judgment sua sponte on that claim because the Roscoes failed to identify any false, deceptive, or misleading statements. Id. at 10-11.

II.

The Roscoes present four arguments on appeal. They contend that the district court (1) lacked jurisdiction over the case and should have remanded the dispute to state court; (2) improperly denied their motion for a default judgment; (3) improperly granted the defendants' motions for summary judgment; and (4) should have granted summary judgment in the Roscoes' favor on all claims "conceded" by the defendants.

1. Jurisdiction and Removal

The Roscoes' challenge to the district court's jurisdiction is twofold. First, they contend that the state court record was not transmitted to the district court. According to the Roscoes, the absence of these documents should have prevented the district court from exercising jurisdiction. Second, they point to the district court's language in the order denying their motion for a default judgment that the "attempted service by mail" on Bank United and Freddie Mac was "ineffective." Id., Doc. 30, at 2. If this service was ineffective, say the Roscoes, then the defendants were not parties to the case and could not have been subject to the district court's jurisdiction. Because removal is typically an issue of statutory construction, "we review a district court's determination of the propriety of removal de novo." Huffman v. Saul Holdings Ltd. Partnership, ___ F.3d ____, No. 98-5053, 1999 WL 791587, at *3 (10th Cir. Oct. 5, 1999) (citation omitted).

We conclude the Roscoes' arguments lack merit. First, the documents before the district court were sufficient to permit removal. To its notice of removal, Freddie Mac attached copies of the summonses served on itself and Bank United, the Roscoes' complaint, and each document appended to the complaint. No more was required under 28 U.S.C. § 1446. See 28 U.S.C. § 1446(a) (stating that a defendant or defendants "desiring to remove any civil action" shall file a notice of removal "containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action"). Second, the Roscoes' "ineffective service" argument also fails. Putting aside the issue of whether the Roscoes could have pursued their complaint in any court if they

failed to serve the defendants in accordance with state law, the defendants answered the complaint and subjected themselves to the district court's jurisdiction. ROA, Docs. 2, 5. Moreover, it is clear that Freddie Mac's notice of removal was otherwise proper, since 12 U.S.C. § 1452 provided the district court with original jurisdiction over the action.(4)

1. Default Judgment

The Roscoes' defense of their motion for a default judgment proceeds along the following lines. The Roscoes mailed summonses dated November 6, 1998 to Bank United and Freddie Mac. The defendants received these summonses on November 12, 1998. The Roscoes maintain that under New Mexico Rule 1-004(E), the defendants had 30 days from the date of the summonses (November 6) to respond to the complaint. As a result, because Freddie Mac did not file its notice of removal until December 7, 1998 - and Bank United did not file a responsive pleading until some time after December 7 - the district court should have entered a default judgment in the Roscoes' favor.(5) "Decisions to enter judgment by default are committed to the district court's sound discretion, and our review is for abuse of discretion." Dennis Garberg & Associates, Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 771 (10th Cir. 1997).

The Roscoes' attack on the denial of their motion for judgment by default is unpersuasive. As an initial matter, the Roscoes failed to mention in their notice of appeal any issue connected with the district court's denial of their motion for a default judgment. ROA, Doc. 50. This alone is fatal to the Roscoes' position,

for we have jurisdiction to review "only the judgment or part of the judgment designated in the notice of appeal." Averitt v. Southland Motor Inn of Oklahoma, 720 F.2d 1178, 1180 (10th Cir. 1983); accord Foote v. Spiegel, 118 F.3d 1416, 1422 (10th Cir. 1997).(6) Furthermore, even if the Roscoes had identified this issue in their notice of appeal, the district court properly denied their request for judgment by default. New Mexico Rule 1-004(E) provides that a plaintiff may serve a defendant by mail with a copy of the summons, a copy of the complaint, and copies of a notice and acknowledgment form. If, however, the acknowledgment form is not returned to the plaintiff within 20 days, the plaintiff must effect personal service on the defendant. Here, Bank United and Freddie Mac never returned the acknowledgment forms, and the Roscoes did not serve the defendants personally. Accordingly, the district court correctly determined that the Roscoes' attempted service by mail was "ineffective." ROA, Doc. 30, at 2.(7) Since the defendants chose to file their answers before personal service was effected, those answers were timely and the Roscoes' motion for a default judgment was unfounded.

1. Summary Judgment

We review a grant of summary judgment de novo. King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1089 (10th Cir. 1999); Martin v. Kansas, 190 F.3d 1120, 1128 (10th Cir. 1999). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we "view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." Martin, 190 F.3d at 1129; accord King of the Mountain Sports, 185 F.3d at 1128. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Martin, 190 F.3d at 1129 (quoting Hardy v. S.F. Phosphates Ltd. Co., 185 F.3d 1076, 1078-80 (10th Cir. 1999)).

The Roscoes object to the district court's grant of summary judgment on several grounds. First, the Roscoes assert that the Rider was an unauthorized "amendment" to the Agreement. In support of this argument, the Roscoes highlight an integration clause stating that the Loan Agreement "embodies the entire agreement between the parties, supersedes all prior agreements and understandings," and "may be amended only by an instrument in writing executed by all of the parties hereto." ROA, Doc. 23, Exh. 4, at 2. Second, the Roscoes argue that the clause of the Agreement incorporating the Rider is only "prefatory" and not binding because it begins with the word "whereas." Third, the Roscoes aver that the Rider was invalid because there was no consideration for it. Fourth, Mr. Roscoe maintains that the Rider was disclosed "near the end of the transactions conducted at the closing meeting," Appellants' Opening Brief at 11, and that he did not fully understand the import of the Rider.(8)

These objections are, to say the least, ill-conceived. The district court properly disposed of the Roscoes' first argument:

> The prepayment rider was incorporated by reference into the note itself, attached thereto, and separately agreed upon by Mr. Roscoe. Mr. Roscoe cannot expect this Court to believe that he agreed to the terms of the note, including the attached prepayment rider, but that such rider is invalid because a prior written agreement to amend was not executed. The absurdity of such argument need not be further discussed. ROA, Doc. 49, at 7; see also Crow v. Capitol Bankers Life Ins. Co., 891 P.2d 1206, 1210-11 (N.M. 1995) ("If two or more writings are part of a single transaction and concern the same subject matter, then they are a single contract.").

The Roscoes' second argument fares no better. The Roscoes cite no authority to show that the language in the contract preceded by the word "whereas" should simply be disregarded. In any event, even if the language in the "whereas" clause was not strictly "binding," it notified the Roscoes that the Note and the Rider - which were signed by all interested parties - were part of the loan transaction. The Roscoes' third argument similarly ignores the plain language of the contract. In exchange for their consent to the terms of the Agreement, the Roscoes received a loan worth $2,325,000. The Roscoes expressly acknowledged that "the prepayment premium provisions of th[e] Rider are a material part of the consideration for the [l]oan." ROA, Doc. 23, Exh. 7, at 3. Finally, the Roscoes' fourth argument lacks evidentiary support. The only evidence cited by the Roscoes on this point is an

affidavit executed by Mr. Roscoe that was not presented to the district court. "In reviewing a grant of summary judgment, we do not consider materials not before the district court." Myers v. Oklahoma County Bd. of County Commissioners, 151 F.3d 1313, 1319 (10th Cir. 1998) (citing John Hancock Mut. Life Ins. Co. v. Wiseman, 27 F.3d 500, 506 (10th Cir. 1994)).(9)

The Roscoes additionally argue that the district court improperly granted summary judgment on all claims asserted in the complaint. According to the Roscoes, the defendants sought judgment as a matter of law only on claims one ("The Rider is Unenforceable"), three ("Express Consideration For the Prepayment Premium is Absent"), and five ("Rider is Illegal Promise"). See ROA, Doc. 1, Exh. A, at 3, 5, 6; id., Doc. 23. The Roscoes maintain that by failing to challenge them in their motion for summary judgment, the defendants "conceded" their claims for unjust enrichment, relief under a state statute prohibiting "prepayment premiums on loans secured by residential property," unconscionability and breach of the implied covenant of good faith and fair dealing, consumer fraud and deceptive business practices, and tortuous interference with contract.

The Roscoes' assertion that a defendant "concedes" liability by choosing not to file a motion for summary judgment is obviously incorrect, but their argument that the district court should not have dismissed the complaint in its entirety requires more analysis. In its motion for summary judgment, Bank United repeatedly emphasized that it was seeking judgment as a matter of law "on all claims asserted against it in Plaintiffs' Complaint." ROA, Doc. 23, at 1, 3, 19.

However, as the Roscoes accurately note, Bank United did not analyze the complaint on a claim-by-claim basis. Instead, Bank United argued that certain uncontested facts "establish[ed] that the Prepayment Rider was an integral part of the loan transaction . . . which was freely and knowledgeably entered into and of reciprocal benefit to both Bank United and the Plaintiffs." Id. at 8. Citing cases from New Mexico and other jurisdictions, Bank United then argued that (1) "where . . . the terms of a contract are freely and knowledgeably agreed upon by the parties, the duty of the courts is to enforce the contract," id.; and (2) prepayment premiums are "fully enforceable" when "a borrower voluntarily prepays a note prior to maturity." Id. at 11. In connection with these arguments, Bank United also discussed principles of fraud, mistake, illegality, unreasonableness, and unconscionability. Id. at 9, 16-18; see also id., Doc. 44, at 2-3 (indicating that Freddie Mac also discussed principles of illegality and unconscionability in its supplement to Bank United's summary judgment motion).

Even though Bank United did not dedicate a specific section in its summary judgment motion to each of the Roscoes' claims, we conclude that the district court properly dismissed the complaint in its entirety. As one commentator has explained in an analogous context, [t]he major concern in cases in which the court wants to enter summary judgment without a Rule 56 motion by either party is not really one of power. . . . Rather, the question raised by the court's action is whether the party against whom the judgment will be entered was given sufficient advance notice and an adequate

opportunity to demonstrate why summary judgment should not be granted. If no opportunity is provided,

then obviously summary judgment should not be entered. If the court provides this opportunity, however, there seems to be no reason for preventing the court from acting on its own. To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases.

10A Charles Alan Wright et al., Federal Practice and Procedure § 2720, at 339-45 (3d ed. 1998) (footnotes omitted); see also Howell Petroleum Corp. v. Leben Oil Corp., 976 F.2d 614, 620 (10th Cir. 1992) ("[A] district court in appropriate circumstances may grant summary judgment on a ground not formally raised in a summary judgment motion."); Durtsche v. American Colloid Co., 958 F.2d 1007, 1009 n.1 (10th Cir. 1992) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgment sua sponte.") (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986)). Applying these criteria to the case at hand, it is evident that the Roscoes were given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not have been granted on all of their claims. Bank United clearly stated that it was seeking judgment as a matter of law on each of the Roscoes' claims. The evidence submitted by Bank United demonstrated that several facts relevant to all of the Roscoes' claims were incontestable. The Roscoes were given an opportunity to submit a response to Bank United's motion, which they did. In short, the Roscoes' claim that they could not have anticipated that the district court was poised to dismiss the complaint cannot be squared with the record.(10)

With one exception (see infra at 23-25), our rejection of the Roscoes' "lack of notice" argument resolves all of the issues raised in this appeal. In their appellate brief, the Roscoes do not cite any authority to rebut the district court's conclusion that their claims for unjust enrichment, tortious interference, unconscionability, and breach of the implied covenant of good faith fail as a matter of law. Nor do the Roscoes highlight any evidence in the record to support these claims; they simply repeat the allegations in their complaint. Compare ROA, Doc. 1, Exh. A, at 4-6, 7-9 (plaintiffs' complaint) with Appellants' Opening Brief at 12-14, 22-26.

Federal Rule of Appellate Procedure 28(a)(9)(A) provides that the appellant's initial brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies . . . ." In the same vein, "[a] litigant who mentions a point in passing but fails to press it 'by supporting it with pertinent authority . . . forfeits the point.'" United States v. Callwood, 66 F.3d 1110, 1115 n.6 (10th Cir. 1995) (quoting Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir. 1990)); accord Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992); see also Primas v. City of Oklahoma City, 958 F.2d 1506, 1511 (10th Cir. 1992) (stating that a litigant "has a duty to provide authority for any argument that he raises") (11)

Even if we ignore the Roscoes' failure to comply with these precedents and the Federal Rules of Appellate Procedure, we cannot conclude that the district court committed reversible error. The Roscoes'

"unconscionability" claim is illustrative. While a contract "may be held to be substantively unconscionable" under New Mexico law, "the threshold for such a holding is very high." Monette v. Tinsley, 975 P.2d 361, 365 (N.M. Ct. App. 1999). To be unconscionable a contract must be "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." State ex rel. State Highway and Transp. Dep't v. Garley, 806 P.2d 32, 39 (N.M. 1991) (citations and internal quotation marks omitted). "The doctrine of unconscionability was intended to prevent oppression and unfair surprise, not to relieve a party of a bad bargain." Id. (citation omitted); see also Smith v. Price's Creameries, 650 P.2d 825, 829 (N.M. 1982) ("[T]he fact that some of the terms of the agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable where it was negotiated at arm's length, and absent an affirmative showing of mistake, fraud or illegality."). Nothing in the record (or in the language of the Rider) even comes close to suggesting that the Roscoes were victims of oppression.

To the contrary, uncontested evidence indicates that the Roscoes knowingly entered into an agreement they now believe was a "bad bargain."

The Roscoes' claims for unjust enrichment, tortious interference, and relief under the Unfair Practices Act are similarly flawed. The Roscoes' unjust enrichment claim in many ways parallels their "unconscionability" claim, and fails for the same reasons. New Mexico recognizes that "[a] person receiving a benefit has been

unjustly enriched if retention of the benefit would be unjust." *Sunwest Bank of Albuquerque, N.A. v. Colucci*, 872 P.2d 346, 349 (N.M. 1994); see also id. ("Where a plaintiff has paid money in the mistaken belief that an enforceable contract exists, the plaintiff is entitled to recover the money paid, as restitution.") (citation omitted). Uncontested evidence submitted by the defendants demonstrates that the Roscoes knew or should have known that the Rider imposed a penalty for prepaying the loan. Bank United and Freddie Mac received the benefits of the bargain they negotiated with the Roscoes, and no more. The gravamen of the Roscoes' tortious interference claim is that Freddie Mac induced Bank United to breach the Agreement. See ROA, Doc. 1, Exh. A, at 8-9. There is no evidence to support the underlying premise of this claim, i.e., that Bank United breached the Agreement. In any case, to pursue a claim for tortious interference with existing or prospective contractual relations, a plaintiff must establish that the defendant "interfered with an improper motive or by improper means, or acted without justification or privilege." Quintana v. First Interstate Bank of Albuquerque, 737 P.2d 896, 898 (N.M. Ct. App. 1987). Uncontroverted evidence demonstrates that Freddie Mac's actions in this case were proper and supported by legitimate business expectations. Essential elements of the Roscoes' Unfair Practices Act claim likewise lack evidentiary support. To invoke the Unfair Practices Act, a plaintiff must show that (1) the defendant made a "false or misleading" representation; (2) the misrepresentation was knowingly made "in connection with the sale, lease, rental or loan of goods or services in the extension of credit or collection of debts;"

(3) the misrepresentation occurred in the regular course of trade or commerce; and (4) the representation was of the type that "may, tends to or does, deceive or mislead any person." Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311 (N.M. 1991) (citations omitted). No evidence indicates that the defendants knowingly made any false or misleading representations to the Roscoes in connection with the Agreement.

In contrast to their other claims, the Roscoes do cite relevant legal authority in their appellate brief to support their claim that the Rider was prohibited by state law. The Roscoes contend that the prepayment provision was precluded by § 56-8-30 of the New Mexico Residential Home Loan Act ("Act"). That section of the Act provides: "No provision in a home loan, the evidence of indebtedness of a home loan, a real estate contract or an obligation secured by a real estate mortgage requiring a penalty or premium for prepayment of the balance of the indebtedness is enforceable." N.M. Stat. Ann. § 56-8-30 (Michie 1998). The Roscoes argue that § 56-8-30 applies in this instance because "[b]y statute Freddie Mac acts to make capital available for home financing," and because the apartment property "is zoned residential by the City of Albuquerque." Appellants' Opening Brief at 24-25.

This claim is deficient as a matter of law as well. Section 56-8-30 does not apply to multi-unit apartment complexes like the one refinanced by the Roscoes. That much is evident from the statutory definitions of Act's operative terms:

A. "residence" means a dwelling and the underlying real property designed for occupancy by one to four families, and includes mobile homes and condominiums;

B. "home loan" means:

(1) a loan made to a person, all or a substantial portion of the proceeds of which will be used to purchase, construct, improve, rehabilitate, sell a residence or refinance a loan on a residence and which loan will be secured in whole or in part by a security interest in the residence evidenced by a real estate mortgage;

(2) the principal amount secured by a real estate mortgage on a residence when that real estate mortgage was executed by the mortgagor in connection with his purchase of the property, and the obligation secured represents part of the deferred purchase price; or

(3) the deferred balance due under a real estate contract made for the purchase or sale of a residence . . .

E. "real estate contract" means a contractual document creating rights and obligations between a seller and buyer of a residence under which the seller agrees to transfer legal title to the residence to the buyer after payment over time of all or part of the purchase price of the residence;

F. "real estate mortgage" means any document creating a security interest in a residence owned by a person to secure the payment of a home loan ..

N.M. Stat. Ann. § 56-8-24 (Michie 1998) (emphasis added). In short, "the Act contemplates protecting purchasers of dwellings intended to house four families or less." Naumburg v. Pattison, 711 P.2d 1387, 1390 (N.M. 1985).(12)

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

FOOTNOTES

*.This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1. On June 2, 1994, Bank United sent a letter agreement to the Roscoes. The letter agreement included a copy of Freddie Mac's May 31, 1994 "commitment letter" and stipulated (among other things) that (1) Bank United would sell the loan to

Freddie Mac and (2) the Roscoes could prepay the note in accordance with Freddie Mac's requirements "together with the payment of a prepayment premium calculated pursuant to [Freddie Mac's] form yield maintenance formula with a yield maintenance period of ten (10) years." The Roscoes signed the letter agreement on June 7, 1994. ROA, Doc. 23, Exh. 3, at 1-2, 6.

2. Section 1452(f) provides that "all civil actions" to which the Federal Home Loan Mortgage Corporation ("Corporation") is a party "shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value . . . ." The statute further provides that: any civil or other action, case or controversy in a court of a State, or in any court other than a district court of the United States, to which the Corporation is a party may at any time before the trial thereof be removed by the Corporation, without the giving of any bond or security, to the district court of the United States for the district and division embracing the place where the same is pending by following any procedure for removal of causes in effect at the time of such removal.

3. Rule 1-004(E) states in relevant part:

A summons and complaint may be served upon a defendant by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgment conforming with the form set out below and a return envelope, postage prepaid, addressed to the sender. If no

acknowledgment of service under this subdivision of this rule is received by the sender within twenty (20) days after the date of mailing, service of such summons and complaint shall be made by a person Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty (20) days after mailing the notice and acknowledgment of receipt of summons.

4. The defendants also note that the Roscoes did not object to Freddie Mac's notice of removal in the district court. Given their obvious substantive deficiencies, we decline to address whether the Roscoes waived these objections by failing to raise them below.

5. The Roscoes further assert that Freddie Mac neglected to respond to their motion for a default judgment. This is plainly false. Although the district court inadvertently omitted the response from its minute entries, the record on appeal includes a file-stamped copy of Freddie Mac's "Response In Opposition To Plaintiffs' Application For Default Judgment." ROA, Doc. 54. The Roscoes argue that we should not consider Freddie Mac's response because Freddie Mac did not bring the omission to the district court's attention until after the case was on appeal. Whether or not the district court had the authority to correct its own minute entries after the Roscoes filed an appeal, Freddie Mac's response brief is part of the record and need not be ignored by this court.

6. The defendants contend that the Roscoes also waived any challenge to the district court's denial of

their motion for a default judgment by conceding in their motion to withdraw that the court's order was "correct and just." Once again, the balance of our opinion makes it unnecessary for us to address this argument.

7. Courts interpreting the former version of Federal Rule of Civil Procedure 4(c)(2)(C)(ii), which is similar to New Mexico Rule 1-004(E), likewise recognize that service by mail is "ineffective" if the defendants do not return the acknowledgment form within the allotted time period. See, e.g., Hajjiri v. First Minnesota Sav. Bank, F.S.B., 25 F.3d 677, 678 (8th Cir. 1994); Mason v. Genisco Tech. Corp., 960 F.2d 849, 852 (9th Cir. 1992); see also Tso v. Delaney, 969 F.2d 373, 375 (7th Cir. 1992) ("Service by mail . . . is not complete unless the acknowledgment form is returned by the defendant."); Carimi v. Royal Carribean Cruise Line, Inc., 959 F.2d 1344, 1347 (5th Cir. 1992) ("If mail service is attempted and the acknowledgment form is not returned, there is no service.").

8. The Roscoes make several other arguments in passing. For instance, the Roscoes assert that "[t]here are more than two plausible interpretations of the Loan Agreement." Appellants' Opening Brief at 20. In support of this argument, however, the Roscoes merely restate their position that the Rider impermissibly "amended" the contract. The Roscoes also claim that there are disputed issues of material fact, but do not support this argument with citations to evidence in the record. Instead, they again restate their position that the Rider "amended" the contract and could not have been incorporated into the Agreement through a non-binding "whereas" clause.

9. Even if this affidavit had been presented to the district court, it would have been insufficient to forestall summary judgment. Over the last 30 years, Mr. Roscoe (who has a Ph.D. from Johns Hopkins University in electrical engineering) has purchased 10 to 12 income-producing properties. ROA, Doc. 23, Exh. 1, at 4-5, 8, 68-69. Mr. Roscoe was familiar with prepayment premiums, having paid such a penalty to another Freddie Mac lender before entering into the contract with Bank United. Id., Doc. 44, Exh. A, at 11, 19-22. The defendants informed Mr. Roscoe several weeks before the Agreement was executed that the contract would include a prepayment premium provision. See id., Doc. 23, Exh. 3, at 1-2, 6. Mr. Roscoe was given an opportunity to review the Rider and other loan documents, read the Rider before signing it, and was capable of understanding the mathematical formula for calculating the premium. Id., Exh. 1, at 25, 68-69, 105-06. Given Mr. Roscoe's background, the circumstances surrounding the execution of the Agreement, and his obligation to carefully review the contract under New Mexico law, see Smith v. Price's Creameries, 650 P.2d 825, 829 (N.M. 1982) ("Each party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it."), his proclaimed ignorance of the meaning of the prepayment premium provision is highly suspect. Mr. Roscoe's own deposition testimony speaks volumes: "I knew the prepayment penalty before I signed on with the loan. I thought I would be a good enough investor that maybe I could overcome this prepayment penalty, [this] high amount, so it was a business decision at that point to pay it." ROA, Doc. 23, Exh. 1, at 87-88. If that were not enough, Mr. Roscoe's professed ignorance appears to be immaterial to most of the issues raised on appeal. Our cases

make clear that "only material factual disputes preclude summary judgment," and a party cannot avoid judgment as a matter of law by submitting "conclusory and self-serving" affidavits. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991); accord Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995).

10. The Roscoes asserted below and reiterate on appeal that they did not have an opportunity to conduct discovery before the district court granted the defendants' motions for summary judgment. However, the "facts" the Roscoes claim they had no opportunity to discover are largely (if not wholly) irrelevant to the issues resolved by the district court. See Appellants' Opening Brief at 19-20. Moreover, if the Roscoes believed they needed additional discovery, their proper recourse was to file a motion accompanied by an affidavit pursuant to Federal Rule of Civil Procedure 56(f). As we observed in International Surplus Lines Ins. Co. v. Wyoming Coal Refining Sys., Inc., 52 F.3d 901 (10th Cir. 1995):

"Although the Supreme Court has held that, under Fed. R. Civ. P. 56(f), summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition, this protection arises only if the nonmoving party files an affidavit explaining why he or she cannot present facts to oppose the motion." The party must state with specificity why extra time is needed and how the additional time and material will rebut the summary judgment motion. "[M]ere assertion that discovery is incomplete or that specific

facts necessary to oppose summary judgment are unavailable" is insufficient to invoke Rule 56(f).

Id. at 905 (first set of quotation marks added, citations omitted).

11. We recognize that pro se pleadings must be "construed liberally." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). In the context of a motion to dismiss, "this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." Id. Even so, it is not the proper function of a court to "assume the role of advocate for the pro se litigant."

Id.; see also United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977) ("He who proceeds pro se with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket."). That maxim is particularly applicable here. Although the Roscoes are proceeding pro se, they are not wholly exempt from the Federal Rules of Appellate Procedure or the requirements of Federal Rule of Civil Procedure 56.

12. The district court did not discuss § 56-8-24 in its order dismissing the Roscoes' claim. Nevertheless, "we may affirm

the judgment of the district court on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." V-1 Oil Co. v. Means, 94 F.3d 1420, 1423 (10th Cir. 1996).

APPENDIX B - TENTH CIRCUIT ORDER DENYING PETITION FOR REHEARING 1/6/00

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BENJAMIN J. ROSCOE; GERALDINE M.ROSCOE,

Plaintiffs - Appellants,

V. No. 99-2234

FEDERAL HOME LOAN MORTGAGE ASSOCIATION; BANK UNITED OF TEXAS FSB

Defendants - Appellees.

ORDER

Filed January 6, 2000

Before **ANDERSON, KELLY and BRISCOE,** Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court
by:
Deputy Clerk

APPENDIX C - THE DISTRICT COURT'S MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 6/26/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BENJAMIN J. ROSCOE and
GERALDINE M. ROSCOE,

Plaintiffs,

VS. CIV # 98-1500 BB/LFG

FEDERAL HOME LOAN MORTGAGE ASSOCIATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

On pro se Plaintiffs' action for refund of prepayment premiums on a commercial mortgage loan, and for allegations of false and deceptive business practices, in violation of NMSA 1978 §§ 57-12-2(A) and 57-12-2(D), the Defendants filed this motion for summary judgment on all claims (Doc. 22). For the reasons stated below, the Defendants' motion for summary judgment is granted.

FACTS

Pro se Plaintiff Benjamin J. Roscoe ("Mr. Roscoe"), who obtained a Ph.D. from Johns Hopkins University in Electrical Engineering in 1967, has been investing in commercial real estate since 1968. Roscoe Dep. at pg. 4, 5. Over the past 30 years, he has purchased between 10 and 12 income producing properties. Roscoe Dep. at pg. 8. On August 20, 1993, the pro se Plaintiffs, Benjamin J. and Geraldine M. Roscoe ("the Roscoes"), entered into a Multifamily Loan Submission Agreement in the amount of $2,325,000 with McMaster & Company, Inc. ("McMaster"). *See* Multifamily Loan Submission Agreement; Roscoe Dep. at pg. 2. The purpose of the loan was to refinance an existing loan from Defendant, Federal Home Loan Mortgage Association ("FHLMA"), on The Brooks Apartments, a property owned by the Roscoes.

The Agreement stated that refinancing would be sought under FHLMA's 1993 refinance program, and that the request would be submitted to, and would require the approval of, both an eligible FHLMA lender and FHLMA. Id. Mr. Roscoe understood that if he qualified for refinancing under the 1993 refinance program, then the bank making the loan, Defendant Bank United of Texas, FSB ("Bank United"), would sell the mortgage to FHLMA. Roscoe Dep. at pg. 19-20,23.

On June 2, 1994, in response to the loan application submitted by Plaintiffs, Bank United sent Plaintiffs a commitment letter, advising that the loan would be sold to FHLMA and that such loan was subject to Plaintiffs' compliance with the term set forth in both that letter and the FHLMA commitment letter dated

May 31, 1994, attached thereto. *See* June 2, 1994 Bank United Letter. This letter set forth the terms of the loan, namely the 20-year term of the loan, and that such loan could be prepaid pursuant to certain requirements, including a prepayment premium calculated in accordance with a yield maintenance formula, with a yield maintenance period of 10 years. Id. The Roscoes understood that the loan would be governed by the terms of the letter and accepted such terms by signing the June 2, 1994 Bank United letter on June 7, 1994. *See* June 2, 1994 Bank United Letter; Roscoe Dep. at pg. 58.

On June 28, 1994, the Roscoes executed a Loan Agreement with Bank United, requiring execution and delivery on that date of certain loan documents. *See* Loan Agreement. On that same date, the Roscoes also executed a Borrower's Affidavit, signifying their acceptance of, among other things, the rights and obligations of the Loan Agreement. Id. Also on that date, the Roscoes executed a Multifamily Note, which expressly incorporated by reference a Rider to Multifamily Note (Prepayment Premium/Yield Maintenance) ("the Rider"). *See* Multifamily Note. The Roscoes then executed the Rider, which expressly amended and supplemented the Multifamily Note, and which expressly waived the right of the Roscoes to prepay the loan, either in whole or in part, prior to its maturity date, except as expressly provided in the Rider. *See* Prepayment Rider. The Roscoes further acknowledged, via the terms of the Rider, that "the prepayment premium provisions of this Rider are a material part of the consideration for the Loan." Id.

The Plaintiffs read the Rider before signing it, were capable of understanding the prepayment premium formula from a mathematical point of view, understood that the prepayment premium was meant to assure FHLMA of its assumed reinvestment rate, and were given ample opportunity and time, without pressure, to review and sign all loan documents. Roscoe Dep. at pg. 25, 68-69, 80-81, 105-106.

In October 1996, Mr. Roscoe decided to refinance the Brooks Apartments again due to a fall in interest rates and the availability of significant cash flow. Id. at pg. 87-89, 120. Bank United issued a payoff quote to Mr. Roscoe, indicating that the payoff premium, pursuant to the formula, would be $394,684.39. *See* Bank United Payoff Statement; Roscoe Dep. at pg. 95, 98. Mr. Roscoe then made a business decision to pay the premium, refinanced the Brooks Apartments through Secure Financial Corporation, and yielded more than $1,000,000 cash from the settlement. Roscoe Dep. at pg. 87-89, 119-120. The Roscoes then filed this action, requesting a refund of the prepayment penalty paid, alleging, inter alia, that (1) the rider is an unenforceable amendment to the loan to which they never agreed, (2) the Defendants were unjustly enriched as a result of receipt of the prepayment penalty fee, (3) no consideration was given to the Plaintiffs by Haines v. Kerner, 404 U.S. 519, 520-521 (1972), but the trial court does not assume the role of advocate for the pro se litigant, and need not accept his conclusory allegations.

Hall v. Belmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Mere opinions and conclusory allegations, unsupported by the evidence, are not sufficient to

withstand summary judgment. Kidd v. Taos Ski Valley, Inc. 88 F.3d 848, 853 (10th Cir. 1996).

Introduction

The Roscoes' cause of action, although couched in the terms of a multi-count complaint, alleging unconscionability, invalidity, and unenforceability of a prepayment rider in a commercial mortgage contract, along with a deceptive business practices claim, effectively encompasses a generalized two-prong inquiry into the validity and enforceability of the contract in question. The answers to these two questions will properly address the Plaintiffs' multiple causes of action, and as discussed *infra, will* summarily dispose of each.

Validity of the Contract

The laws of contract and real property are normally the province of state law. Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979). Ordinarily, to be legally enforceable, a contract must be supported by an offer, acceptance, consideration, and mutual assent. Garcia v. Middle Rio Grande Conservancy Dist., 121 N.M. 728, 731, 918 P.2d 7, 10 (1996). Mutual assent is based on objective evidence, not the private, undisclosed thoughts of the parties; what is operative is the objective manifestation of mutual assent by the parties, not their secret intentions. Pope v. Gap. Inc., 125 N.M. 376, 379, 961 P.2d 1283, 1286-1287 (1998). New Mexico has a strong public policy in favor of freedom of contract,

which requires enforcement of contracts unless they clearly contravene some law or rule of public morals or violate some fundamental principle of justice. Reagan v. McGee Drilling Corp., 123 N.M. 68, 72, 933 P.2d 867, 871 (1997).

Absent a showing of fraud, misrepresentation, or other wrongful acts, each party to a written contract is generally presumed to know its terms, to have agreed to its provisions, and to be bound thereby under New Mexico law. Ballard v. Chavez, 117 N.M. 1, 868 P.2d 646 (1994). Such assenting parties must accept the burdens of the contract along with its benefits. Russell v. Richards, 103 N.M. 48, 51, 702 P.2d 993, 996 (1985). In the absence of an ambiguity, a court must interpret and enforce the clear language of the contract, and cannot make a new agreement for the parties. Montoya v. Villa Linda Mall. Ltd., 110 N.M. 128, 129, 793 P.2d 258, 259 (1990). A contract will be deemed ambiguous if the court determines that it can reasonably and fairly be interpreted in different ways. Mark V. Inc. v. Mellekas, 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993). In interpreting a contract, the court must consider the contract as a whole and give significance to each part. Kirkpatrick v. Introspect Healthcare Corp., 114 N.M. 706, 711, 845 P.2d 800, 805 (1992).

The mortgage loan in question, including the prepayment rider, clearly constitutes a valid contract under New Mexico law. The Roscoes read the terms of the agreement, understood those terms, and signified their acceptance by signing both the agreement and the rider. Furthermore, there is no evidence of fraud

or misrepresentation on the part of the Defendants in securing the loan.

To the contrary, Mr. Roscoe himself admitted in his deposition that he fully understood the terms in the entire loan agreement, including those in the prepayment rider. Mr. Roscoe cannot now avoid the terms of the loan agreement.

Mr. Roscoe attempts to argue that the terms of the loan agreement, which he signed, constituted the entire agreement, and that the prepayment rider, which he also signed, was not part of the loan agreement. In other words, Mr. Roscoe argues that the loan agreement, by its terms, states that the parties must *agree in writing to amend the loan agreement* before the parties can actually amend the agreement. Looking at the agreement as a whole, the Court disagrees. The prepayment rider was incorporated by reference into the note itself, attached thereto, and separately agreed upon by Mr. Roscoe. Mr. Roscoe cannot expect this Court to believe that he agreed to the terms of the note, including the attached prepayment rider, but that such rider is invalid because a prior written agreement to amend was not executed. The absurdity of such argument need not be further discussed.

In sum, it is undisputed that the Roscoes knew about the prepayment premium before they entered into the loan agreement, signed the written document containing the prepayment provision, and thereby agreed to be bound by the terms of the agreement. Therefore, the Court finds that the commercial

mortgage loan agreement, including the prepayment premium, constitutes a valid contract.

Enforceability of the Prepayment Premium

The New Mexico legislature considered prepayment premiums in residential mortgage loans, and expressly prohibited them in such loans obtained between March 15, 1979 and October 15, 1982. *See* NMSA 1978 48-7-19 and 56-8-30. Thereafter, prepayment premiums were left to the parties, even in residential loans. The issue of the enforceability of prepayment premium in commercial mortgage loans has not been squarely addressed in the state of New Mexico. The fact that the legislature failed to include such loans in the earlier ban, however, may indicate fewer public policy concerns in commercial lending, where the parties are generally more sophisticated and more equal bargaining capacity.

The issue has, however, be en addressed by a North Carolina court, where it was held that such prepayment provisions of a note executed in connection with a large commercial real estate loan were valid and enforceable. *See, generally,* West Raleigh Group v. Mass. Mut. Life Ins. Co., 809 F. Supp. 384 (E.D.N.C. 1992). The authority cited by the Defendants in their brief further establishes legal recognition of the enforceability of commercial mortgage prepayment premiums in the case of voluntary prepayment by the borrower *(see, e.g.,* Tyler v. Equitable Life Assur. Soc., 512 So.2d 55 (Ala. 1987); First Nat. Bank v. Equitable Life Assur. Soc. 510 N.E.2d 518, *appeal denied, 515* N.E.2d 107 (Ill. 1987); First Indiana Fed. Sav. Bank v. Maryland Dev.

Co., 509 N.E. 2d 253 (Ind. App. 1987)). The Defendants also offer many policy-based justifications for such enforcement, such as protection of lenders from damage due to lower interest rates *(see* Sacramento Sav. & Loan Ass'n v. Superior Ct. 186 Cal.Rptr. 823, 826 (Cal. Ct. App. 1982)), amortization of administrative losses, short-term investment losses, and adverse tax liability *(see* Chesnut Corp. v. Bankers Bond '~, "Jorteap-e Co. 149 A.2d 48 (Pa. 1959), and risk allocation between lenders and borrowers *(see* Dale A. Whitman, Mortgage Prepayment Clauses: An Economic and Legal Analysis, 40 U.C.L.A. L. Rev. 851, 862, 873 (1993)).

The Court finds such rationale persuasive. Mr. Roscoe accepted the terms of the prepayment premium voluntarily. He understood the terms and the formula involved in calculating the premium and he was given ample time to review the rider prior to acceptance of its terms. As such, the Court finds that the prepayment rider is, indeed, an enforceable contract under New Mexico law.

The Roscoes next assert that the prepayment premium is still unenforceable due to unconscionability, unjust enrichment, and the illegality of the penalty. It is true that when the terms of a contract are unreasonably favorable to one party, a contract may be held to be substantively unconscionable. Monette v. Tinsley, 975 P.2d 361, 396 (Ct. App. N.M. 1999). However, the threshold for such a holding is very high, requiring a finding that the terms are such that "no man in his senses and not under delusion would make on the one hand, and ... no honest and fair man would accept on the other." Id.

(quoting In re Friedman 64 A.D.2d 70,407 N.Y.S.2d 999, 1008 (1978)).

Moreover, a person receiving a benefit will only be deemed to have been unjustly enriched if the retention of such benefit would be unjust. Sunwest Bank of Alb. v. Colucci, 117 N.M. 373, 376, 872 P.2d 346, 349 (1994). Therefore, "[a]lthough a contract may be declared void where it is unconscionable and oppressive in its terms, *nevertheless, the* fact that some of the terms of the agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable where it was negotiated at arm's length, and absent an affirmative showing of mistake, fraud or illegality." Smith v. Price's Creameries 98 N.M. 541, 545, 650 P.2d 825, 829 (1982). Given Mr. Roscoe's Ph.D. status, his investment experience in excess of 30 years, and his admitted ability and capacity to understand the terms of the agreement and the prepayment formula, coupled with the relative value and price of the transaction, there is no evidence that either the mortgage or the prepayment rider are unconscionable.

Nor does the disparity between the prepayment penalty and the amount of the loan rise to the level of unjust enrichment for the Defendants, since the retention of the prepayment premium, necessary to secure their reinvestment rate, would not be unjust. Finally, it cannot be said that the prepayment rider constitutes an illegal promise, since the Plaintiffs voluntarily sought to invoke the privilege of prepayment in order to secure a lower interest rate with another lender. *See* West Raleigh Group 809 F.

Supp. at 390-391. Hence, the prepayment premium is enforceable.

Therefore, the commercial mortgage loan agreement between the Roscoes and the Defendants constitutes both a valid and an enforceable contract as a matter of law, and the parties are bound by the terms of the agreement. Hence, the Court finds that the Defendants' motion for summary judgment relating to counts (1) through (6) should be granted.

The Unfair Practices Act

Although the Plaintiffs have asserted claim under both NMSA 1978 §§ 57-12-2(A) and 57-12-2(D) of the Unfair Practices Act, these sections of the New Mexico Code are definitional provisions, in which no causes of action lie. However, for the purposes of this opinion, the Court will take judicial notice that the Plaintiffs are attempting to state a cause of action under NMSA 1978 § 57-12-3.

Under New Mexico law, it is unlawful to implement "unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce." NMSA 1978 § 57- The term "unfair trade practice" is defined as "any false or misleading oral or written statement ... *knowingly made* ... which tends to or does deceive or mislead any person ..." NMSA 1978 § 57-12-2(D) (emphasis added). In order to support such a claim, evidence must be presented that a party knowingly made a false or misleading statement in connection with the negotiation of the agreement. Stevenson v. Louis

Dreyfus Corp., 112 N.M.97, 811 P.2d 1308 (199 1). Plaintiffs provide no evidence of a statement Defendants made with knowledge it was false or misleading.

Alternatively, the term "unconscionable trade practice" is defined as "any act or practice ... which to a person's detriment (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." NMSA 1978 § 57-12-2(E). By the plain meaning of the statute, it appears obvious that the Court need take into consideration the knowledge, ability, skill and capacity of the Plaintiffs, along with the differentiation between the value received by the Plaintiffs and the price paid for the mortgage loan in making such a determination. As discussed supra, the prepayment rider is not unconscionable. The Court has been unable to locate any reference on the record, not to mention in the motion before this Court, by the Defendants to an Unfair Practices

Act claim by the Plaintiffs. Given this observation, this Court has the discretion to grant summary judgment *sua sponte* if the losing party was on notice that it had to come forward with all its evidence, and had an opportunity to present that evidence in court. *See, e.g.*, Sports Racing Serv. v. Sports Car Club of America, 131 F.3d 874, 892 (10th Cir. 1997). As such, it is the judgment of this Court that summary judgment *sua sponte* should be entered on the Plaintiffs' claim under the Unfair Practices Act, NMSA 1978 § 57-12-3.

CONCLUSION

For all the foregoing reasons, the Defendants' motion for summary judgment will be granted, the Plaintiffs' cross motion for summary judgment will be denied, and all subsequent Plaintiffs' motions before the Court will be denied. This action is therefore dismissed.

ORDER

IT IS THEREFORE ORDERED that Defendant's March 26, 1999 motion for summary judgment (Doc. 22) be, and hereby is, GRANTED. This action is hereby DISMISSED. All pending Plaintiff motions are hereby DENIED.

DATED June 28,1999.

BRUCE D. BLACK
UNITED STATES DISTRICT JUDGE

Attorneys:

For Plaintiffs
Benjamin J. and Geraldine M. Roscoe
Pro Se Plaintiffs
5328 Montgomery Blvd., N.E.
Albuquerque, NM 87110

For Defendant Federal Home Loan Mortgage Association

Thomas J. McBride, Esq.

Hinkle, Cox, Eaton, Coffield & Hensley, L.L.P.

Post Office Box 2043

Albuquerque, NM 87103-2043

For Defendant Bank United of Texas, FSB

Timothy M. Sheehan

Kim A. Griffith

Sheehan, Sheehan, & Stelzner, P.A.

Post Office Box 271

Albuquerque, NM 87103

APPENDIX D - JUSTICE BREGER'S EXTENTION OF THE TIME TO FILE PETITION 2/17/00

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

February 17, 2000

Mr. Benjamin J. Roscoe
5328 Montgomery Boulevard NE
Albuquerque, NM 87109

Re: Benjamin J. Roscoe
v. Federal Home Loan Mortgage
Association, et al.
Application No. 99A663

Dear Mr. Roscoe:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on February 17, 2000, extended the time to and including May 20, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
Sandra ElliottSpagnolo
Assistant Clerk

APPENDIX E-LOAN AGREEMENT CONTRACT

LOAN AGREEMENT

THIS LOAN AGREEMENT (this "Agreement 11) is made and entered into the 28th day of June, 1994, by and between **BENJAMIN J. ROSCOE and GERALDINE ROSCOE** (collectively "Borrower") and **BANK UNITED OF TEXAS FSB** ("Lender").

W I T N E S S E T H:

WHEREAS, Borrower is refinancing certain real property situated in the City of Albuquerque, Bernalillo County, New Mexico, as is more particularly described on Exhibit "All attached hereto and made a part hereof for all purposes (the "Property");

WHEREAS, Lender has agreed to make a loan to Borrower and Borrower has agreed to borrow from Lender, the sum of TWO MILLION THREE HUNDRED TWENTY-FIVE THOUSAND AND 00/100 DOLLARS ($2,325,000.00) for the purpose of acquiring the Property (the "Loan");

WHEREAS, Borrower shall of even date herewith execute and deliver to Lender certain loan documents including, without " limitation, a Multifamily Note with attachments (the "Note") and a Multifamily Mortgage, Assignment of Rents and Security Agreement with attachments (the "Mortgage") (the Note, the Mortgage, and all other documents evidencing, securing, and

relating to the Note are collectively referred to herein as the "Loan Documents");

WHEREAS, both Borrower and Lender anticipate that the Federal Home Loan Mortgage Association ("Freddie Mac") will purchase the Loan and take an assignment of the Loan Documents in accordance with the Freddie Mac Multifamily Guide and the terms of Freddie Mac's commitment letter dated May 31, 1994, covering the Property; and

WHEREAS, the parties desire to set forth herein their understandings and Agreements with respect to Freddie Mac's purchase of the Loan and other matters;

NOW THEREFORE, for and in consideration of the mutual covenants and agreements described herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower and Lender hereby agree as follows:

1. Further Assurances. Upon request, Borrower shall immediately take all actions required by Lender, and Borrower shall immediately deliver to Lender, at Borrower's sole cost and expense, all documents and instruments as Lender and Freddie Mac may require in connection with completing the Loan and the Loan Documents and as Lender may reasonably require in connection with the sale of the Loan to Freddie Mac.

2. Refusal to Purchase. If Freddie Mac fails to purchase the Loan from Lender, Borrower shall take all actions required by Lender to vest title to the Loan back in Lender, and Borrower shall immediately deliver to Lender, at Borrower's sole cost and expense, all documents and instruments as Lender may require in connection therewith including paying all recording fees and title policy endorsement fees.

3. Cost and Expenses. . Borrower hereby agrees to pay to Lender an amount equal to all costs and expenses incurred by Lender, including all attorneys' fees, in connection with completing the Loan, the Loan Documents, the sale of the Loan to Freddie Mac, and, if necessary, the reconveyance of the Loan to Lender by Freddie Mac if Freddie Mac fails to purchase the Loan from Lender.

4. Default. Failure of Borrower to comply with any provision of this Agreement shall constitute a default under the Note, the Mortgage, and the other Loan Documents.

5. Miscellaneous.

(a) Notices. All notices or communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be considered as properly given after being mailed from within the United States by first class United States mail, certified mail, return receipt requested, postage prepaid and addressed to the party at the address set forth opposite such party's signature on the signature page hereof, or when actually delivered if given in any

other manner. Any party may change its address by giving notice in writing, stating its new address, to the other party.

(b) Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

(c) Entirety and Amendments. This instrument embodies the entire agreement between the parties, supersedes all prior agreements and understandings, if any, relating to the subject matter hereof, and may be amended only by an instrument in writing executed by all of the parties hereto, and supplemented only by documents delivered or to be delivered in accordance with the expressed terms hereof.

(d) Parties Bound. This Agreement shall be binding upon and inure to the benefit of the parties hereto, and their respective heirs, executors, administrators, successors, and assigns.

(e) Waiver. The failure of Lender at any time or from time to time to require performance of any of Borrower's obligations under this Agreement shall in no manner affect Lender's right to enforce any provision of this Agreement at a subsequent time, and the waiver by Lender of any right arising out of any breach shall not be construed as a waiver of any right arising out of any subsequent breach.

(f) Paragraph Headings. The headings in this Agreement are inserted for convenience and identification only and are not intended to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or its provisions.

(g) Remedies. The parties hereto shall have all rights, remedies, and recourses granted herein and available at law or equity and same: (a) shall be cumulative and concurrent; (b) may be pursued separately, successively, or concurrently; (c) may be exercised as often as an occasion therefor shall arise, it being agreed that the exercise or failure to exercise any of the same shall in no event be construed as a waiver or release thereof or of any other right, remedy or recourse; and (d) are intended to be, and shall be, nonexclusive.

EXECUTED as of the day and year first above written.

BORROWER:
BENJAMIN J. ROSCOE
GERALDINE ROSCOE

Address:
5328 Montgomery Boulevard, NE
Albuquerque, New Mexico 87109

LENDER:

BANK UNITED OF TEXAS FSB

By: _____

David R. Johnson
Chief Underwriter
Multifamily Division-Agency

Address:
8131 LBJ Freeway, Suite 760
Dallas, Texas 75251

APPENDIX F-MULTIFAMILY NOTE

MULTIFAMILY NOTE

US $2,325,000.00 Albuquerque, New Mexico

June 28, 1994

For VALUE RECEIVED, the undersigned promise to pay BANK UNITED OF TEXAS FSB. order, the principal sum of Two Million Three Hundred Twenty-Five Thousand and 00/100 Dollars ($2,325,000.00) Dollars with interest on the unpaid principal balance from the date of this Note, until paid, at the rate or 9.52 percent per annum. The principal and interest shall be payable at 8131 LBJ Freeway, Suite 760, Dallas,.Texas 75251or such other place as the holder hereof may designate in writing, in consecutive monthly installments of Twenty-One Thousand Seven Hundred Two and. Dollars (US 21,702.42) on the 1st day of each month beginning August 1, 1994 (herein "amortization commencement date"), until the entire indebtedness evidenced hereby is fully paid, except that any remaining indebtedness, if not sooner paid, shall be due and payable on July 4, 2014

If any installment under this Note is not paid when due, the entire principal amount outstanding hereunder and accrued interest thereon shall at once become due and payable, at the option of the holder hereof. The holder hereof may exercise this option to

accelerate during any default by the undersigned regardless of any prior forbearance. In the event of any default in the payment of this Note, and if the same is referred to an attorney at law for collection or any action at law or in equity is brought with respect hereto, the undersigned shall pay the holder hereof all expenses and costs, including, but not limited to, attorney's fees.

Prepayments shall be applied against the outstanding principal balance of this Note and shall not extend or postpone the due date of any subsequent monthly installments or change the amount of such installments, unless the holder hereof shall agree otherwise in writing. The holder thereof may require that any partial prepayments be made on the date monthly installments are due and be in the amount of that part of one or more monthly installments which would be applicable to principal.

From time to time, without affecting the obligation of the undersigned or the successors or assigns of the undersigned to pay the outstanding principal balance of this Note and observe the covenants of the undersigned contained herein, without affecting the guaranty of any person, corporation, partnership or other entity for payment of the outstanding principal balance of this Note, without giving notice to or obtaining the consent of the undersigned, the successors or assigns of the undersigned or guarantors, and without liability on the part of the holder hereof, the holder hereof may, at the option of the holder hereof, extend the time for payment of said outstanding principal balance or any part thereof, reduce the payments thereon, release anyone liable on

any of said outstanding principal balance, accept a renewal of this Note, modify the terms and time of payment of said outstanding principal balance, join in any extension or subordination agreement, release any security given herefor, take or release other or additional security, and agree in writing with the undersigned to modify the rate of interest or period of amortization of this Note or change the amount of the monthly installments payable hereunder.

Presentment, notice of dishonor, and protest are hereby waived by all makers, sureties, guarantors and endorsers hereof. This Note shall be the joint and several obligation of all makers, sureties, guarantors and endorsers. and shall be binding upon them and their successors and assigns.

The indebtedness evidenced by this Note *is* secured by a Mortgage or Deed of Trust dated of even date, herewith and reference is made thereto for rights as to acceleration of the indebtedness evidenced by this Note. This Note shall be governed by the law of the jurisdiction in which the Property subject to the Mortgage or Deed of Trust is located.

See Default Interest Rider to Multifamily Note, Rider to Multifamily Note (prepayment Premium\Yield Maintenance), and Exculpation Rider to Note and Security Instrument attached hereto for additional provisions.

EXECUTED this 28th day of June, 1994.

_____

BENJAMIN J. ROSCOE

_____

GERALDINE ROSCOE

APPENDIX G-RIDER AMENDMENT

RIDER TO MULTIFAMELY NOTE
(Prepayment Premium/Yield Maintenance)

THIS RIDER TO MULTIFAMILY NOTE is made this 28th day of June, 1994 , and is incorporated into and shall be deemed to amend and supplement the Multifamily Note made by the undersigned (the "Borrower") to BANK UNITED OF TEXAS FSB and its successors. assigns and transferees (the "Lender") dated the same date as this Rider (the "Note"). The loan evidenced by the Note (the "Loan") is secured by a Mortgage, Deed of Trust. or Deed to Secure Debt of the same date (the "Instrument") covering the property described in the Instrument and located at:

5328 Montgomery Blvd, NE, Albuquerque, New Mexico 87109 (Property Address)

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Note. Borrower further covenants and agrees as follows:

1. Waiver of Prepayment Right

Borrower expressly waives any right to prepay the Loan in whole or in part prior to the maturity date of the Note except as expressly provided in this Rider.

A. Conditions for Prepayment During Yield Maintenance Period: Prepayment Premium

Between the date of the Note and the date that is 120 months after the date of the Note (the "Yield Maintenance Period"), upon giving Lender 60 days prior written notice, Borrower may prepay all or any portion of the unpaid principal balance of the Note on a scheduled monthly payment date by paying a prepayment premium in addition to the payment of principal, accrued interest and any other sums due Lender at the time of the prepayment. Such prepayment premium shall equal the present value of any costs to Lender resulting from the difference in interest rates between the date of the Note and the date on which the prepayment is made.

Definitions:

Monthly-----one-twelfth (1/12) of the annual interest rate of the Note, expressed

Note Rate: as a decimal calculated to five digits

Prepayment Date: the date on which the prepayment is made

Assumed-----one-twelfth (1/12) of the yield rate as of the date 5 business days

Reinvestment ----prior to the prepayment , on the 13.75 % U.S.

Rate: Treasury Security due August 2004. as reported in the Wall Street Journal. expressed as a decimal calculated to five digits

Present Value ---------the factor that discounts to present value the costs resulting to

Factor: Lender from the difference in interest rates during the months

remaining in the Yield Maintenance Period. using the Assumed Reinvestment Rate as the discount rate, with monthly compounding, expressed numerically as follows:

1-(1/1+ARR)*n/ARR

n=number of months remaining in Yield Maintenance Period

ARR=Assumed Reinvestment Rate

The prepayment premium payable upon a prepayment during the Yield Maintenance Period shall be calculated as

i. the amount of principal being prepaid.

ii. the difference between the Monthly Note Rate and the Assumed Reinvestment Rate;

multiplied by

iii. the Present Value Factor.

Minimum Prepayment Premium Notwithstanding the foregoing, in no event shall the amount of a prepayment premium due during the Yield Maintenance Period be less than 1% of the amount of principal being prepaid.

In the event that no yield is published on the applicable date for the Treasury Security used to determine the Assumed Reinvestment Rate, then the Lender shall select the non-callable Treasury Security maturing in the same year as the Treasury Security specified above with the lowest yield published in the Wall Street Journal as of the applicable date. If the publication of such yield rates in the Wall Street Journal is discontinued for any reason. Lender shall select a security with a comparable rate and term to the Treasury Security used to determine the Assumed Reinvestment Rate. The selection of an alternate security pursuant to this paragraph shall be made in Lender's sole discretion, and shall be conclusive.

B. **Conditions for Prepayment After Yield Maintenance Period; Prepayment Premium.**

After the expiration of the Yield Maintenance Period and upon giving Lender 60 days prior written notice, Borrower may prepay all or any portion of the unpaid principal balance of the Note on a scheduled monthly payment date by paying, in addition to the payment of principal. accrued interest and any other sums due Lender at the time of the prepayment. a prepayment premium equal to I% of the amount of principal being

prepaid. provided. however. that no prepayment premium shall be required during the last ninety (90) days of the term of the .Note.

II. Other Prepayments; Prepayment Premium

Borrower shall also pay a prepayment premium with respect to any other reduction in the principal balance of the Loan (a "principal reduction") which reduces the principal balance of the Loan to less than the scheduled principal balance as of the date such principal reduction is made, including without limitation any principal reduction resulting from:

(i) the acceleration by Lender of the unpaid principal balance of the Note pursuant to the acceleration provisions contained in the Note and/or the Instrument. Upon default by Borrower, including without limitation, violation by Borrower of the restrictions set forth in the Instrument on the sale. transfer or encumbrance of the property or transfer of a beneficial interest in Borrower. or

(ii) any satisfaction or release of the Instrument by foreclosure (whether by power of sale or by judicial proceeding), deed in lieu of foreclosure. or any other means.

The amount of the prepayment premium payable upon a principal reduction pursuant to this section 11 shall be determined pursuant to section I(A) above if the principal reduction occurs during the Yield

Maintenance Period. and pursuant to section I(B) above if the principal reduction occurs following the expiration of the Yield Maintenance Period. Notwithstanding the foregoing, no prepayment premium shall be due with respect to any principal reduction resulting from the exercise of Lender's option to apply

insurance proceeds or condemnation awards to the unpaid principal balance of the Loan pursuant to the terms of the Instrument.

III. Provision Knowingly Agreed to by Borrower

Borrower recognizes that default by Borrower causing a prepayment of the Loan will result in Lender incurring additional expense in servicing and enforcing the Loan. loss to Lender of the use of the money due and interest accruing thereon. and frustration or impairment of Lender's ability to meet its commitments to third parties. Borrower agrees that. in the event of any such prepayment caused by Borrower's default. Lender shall be entitled to damages for the detriment caused thereby but that it is extremely difficult and impractical to ascertain the extent of such damages. Borrower therefore acknowledges and agrees that the prepayment premiums set forth in this Rider represent reasonable estimates of such damages to Lender. which sum Borrower agrees to pay upon demand. Borrower acknowledges that the prepayment premium provisions of this Rider are a material part of the consideration for the Loan.

IV. Loan Made for Business Purposes

Borrower represents and warrants that the Loan is made for the purpose of acquiring or carrying on a business, commercial, or investment activity.

V. Notice

Any notice to Lender provided for in this Rider to Multifamily Note shall be given in the manner provided in the Instrument.

_____

BENJAMIN J. ROSCOE

_____

GERALDINE ROSCOE